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Cross-claimants BLUE ROCK CAPITAL,
LTD., and ESPRO INVESTMENTS, LTD.

UNITED STATED DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED MEDICAL DEVICES, LLC, a California limited liability company, UNITED CONVENIENCE SUPPLY LLC, a Delaware Limited Liability Company,

Plaintiffs,

v.

BLUE ROCK CAPITAL LTD., a Mauritius limited liability company; ESPRO INVESTMENTS LTD., a Mauritius limited liability company; PRASANTH SEEVNARYAN, an individual; and DOES 1-50,

Defendants.

BLUE ROCK CAPITAL LTD. and ESPRO INVESTMENTS LTD,

Counter-Claimants and Cross- Claimants,

v.

UNITED MEDICAL DEVICES, LLC and UNITED CONVENIENCE SUPPLY LLC,

RELATED CASES:
Civil Actions
2:16-cv-01255-PSG-SSx and
2:16-cv-03176-PSG SSx

The Hon. Philip S. Guiterrez
Courtroom 880
Magistrate Judge Suzanne H. Segal
Roybal Federal Building

COUNTER-CLAIM OF BLUE ROCK CAPITAL LTD AND ESPRO INVESTMENTS LTD AGAINST COUNTER DEFENDANTS UNITED MEDICAL DEVICES, LLC AND UNITED CONVENIENCE SUPPLY, LLC; AND CROSS-CLAIM OF BLUE ROCK CAPITAL LTD AND ESPRO INVESTMENTS LTD AGAINST CROSS-DEFENDANTS JIMMY ESEBAG AND NICOLAI ALLEN,

Counter-Defendants,

and

JIMMY ESEBAG and NICHOLAI ALLEN, an individual; and DOES 1 through 20, inclusive,

Cross-Defendants.

MEGACOR INVESTMENTS (PTY) LTD., a South African limited liability company; KIRAN SALES (PTY) LTD., a South African limited liability company; and QUICK DRINKS COMPANY (PTY) LTD., a South African limited liability company,

Plaintiffs,

v.

UNITED MEDICAL DEVICES, LLC, a California limited liability company; UNITED CONVENIENCE SUPPLY LLC, a Delaware Limited Liability Company; JIMMY ESEBAG, an individual; NICHOLAI ALLEN, an individual; and DOES 1 through 10, inclusive,

Defendants.

Counter-Claimants and Cross-Claimants BLUE ROCK CAPITAL LTD. (“BLUE ROCK”) and ESPRO INVESTMENTS LTD. (“ESPRO”) submit the following counter-claim and cross-claim against counter-defendants UNITED MEDICAL DEVICES, LLC (“UMD”) and UNITED CONVENIENCE SUPPLY LLC (“USC”) and cross-defendants JIMMY ESEBAG (“ESEBAG”) and NICHOLAI ALLEN (“ALLEN”), at times referred to collectively as “Cross-defendants,” by alleging the following:

THE PARTIES

1. BLUE ROCK and ESPRO are the counter-claimants and cross-claimants in this Action (collectively referred to at times as “Cross-Claimants”).

2. UMD and UCS are the plaintiffs and counter-defendants in this Action.

3. ESEBAG and ALLEN are the defendants in the action captioned "MEGACORP INVESTMENTS (PTY) LTD et. al. v. UNITED MEDICAL DEVICES, LLC, et. al.," which is consolidated with this action, and are the cross-defendants in this action.

ALLEGATIONS COMMON TO ALL CAUSES OF ACTION

4. Cross-Claimants are informed and believe, and based thereon allege, that at all times herein mentioned, ESEBAG and ALLEN were officers, directors, managers, employees and/or representatives of UMD and UCS, and in doing the acts alleged herein, did so in such capacity, and thereby caused or contributed to the damages that Cross-Claimants suffered.

5. Cross-Defendants DOES 1 through 20 are individuals and entities whose names are currently unknown to Cross-Claimants and who have acted in concert with Cross-Defendants and participated in the acts alleged herein. Upon information and belief, DOES 1 through 20 include individuals and entities currently located in the United States and other countries currently unknown to Cross-Claimants.

6. Cross-Claimants are informed and believe and thereon allege that ESEBAG and ALLEN dominate and control the business and affairs of UMD and USC and they use their limited company forms for their own personal benefits and to avoid creditors and personal liability for their own wrongdoings.

7. Cross-Claimants are informed and believe and thereon allege that UMD and UCS are not adequately capitalized for the business they conduct and it would sanction a fraud and promote injustice to recognize the legal separateness of ESEBAG, ALLEN on the one hand and defendants UMD and UCS on the other, respecting the matters alleged herein.

8. Cross-Claimants are informed and believe and thereon allege that

ESEBAG and ALLEN use the purported limited liability company funds and assets of UMD and UCS as their own, and they commingle the assets of UMD and UCS with each other and with the individual Cross-Defendants ESEBAG and ALLEN.

9. Cross-Claimants are informed and believe and thereon allege the following: that UMD, UCS, ESEBAG and ALLEN are the alter egos of each other and/or are liable to Cross-Claimants under the single enterprise doctrine; that UMD, UCS, ESEBAG and ALLEN participated in and continue to participate in a common business venture involving the licensing and sale of the distribution rights to Playboy products world-wide, and also the sale of Playboy products; that UMD and UCS have common owners and employees; and that they share the same business locations, telephone numbers, website and email systems.

10. Cross-Claimants are informed and believe and thereon allege that UMD and UCS are merely the instrumentality, agency, conduit or adjunct of each other and of ESEBAG and ALLEN, and that there is such a unity of interest and ownership between UMD, UCS, ESEBAG and ALLEN that their separate personalities have ceased to exist. Cross-Claimants are further informed and believe and thereon allege that, if the acts of UMD and UCS are treated as the acts of each company alone, an equitable result will follow.

11. UMD, UCS and their representatives ESEBAG and ALLEN (collectively referred to hereafter as "Cross-Defendants") are merchants as defined by California Commercial Code, § 2104(1), and held themselves out as having knowledge and skill peculiar to the goods involved in the transactions they engage in, including the facts alleged in this action and in the accompanying action MEGACORP, KIRIN and QUICK DRINKS filed against Cross-Defendants.

12. At all relevant times, Cross-Defendants have held and continue to hold the licensing rights to manufacture, distribute and sell products bearing the universally known "Playboy" and "Rabbit Head Design" mark, and the right to appoint distributors of Playboy licensed products throughout the world.

13. Cross-Defendants at all times held themselves out as experts in the marketing and distribution of Playboy products based on their involvement in this type of business throughout the world for many years and particularly the Playboy range thereof. ESEBAG and ALLEN also represented and warranted that the products bearing the Playboy logo were always and would be of the highest quality, and that they would cooperate fully in ensuring that Cross-Claimants would receive delivery of the products in sufficient time to enable Cross-Claimants to timely distribute such products to their customers in India and Africa.

14 At all material times, ESEBAG and ALLEN had knowledge of the following facts:

(a) Investors in BLUE ROCK and ESPRO would be investing millions of dollars in the business venture involving the distribution of Playboy products throughout various territories in Africa and India.

(b) Cross-Claimants relied on the representations of ESEBAG and ALLEN concerning their expertise in the marketing of Playboy licensed products; and

(c) The success of the venture depended on Cross-Defendants' good faith cooperation in ensuring that the requirements to complete the manufacture of condoms under the Playboy license, such as the delivery of holograms and packaging for condoms to be manufactured under the Playboy license in India would be timely delivered to such manufacturer.

FIRST CLAIM FOR BREACH OF CONTRACT BY BLUE ROCK AND ESPRO

15. Cross-Claimants repeat and incorporate by reference herein the allegations set forth above.

16. On April 10, 2014, BLUE ROCK and ESPRO entered into a written Distribution Agreement with UMD and UCS with an effective commencement date of April 1, 2014 and terminating date of April 30, 2014. A copy of the Agreement

is attached to the Amended Complaint filed by UMD and UCS.

17. In reliance on the facts alleged in paragraph 14 above, BLUE ROCK and ESPRO granted third parties the manufacturing and distribution rights for condoms in Africa and India, distribution rights for electronic cigarettes in Africa and India, and distribution rights for lubricants in Africa.

18. On April 22, 2015, ESPRO LIFESTYLE (PVT) LTD. ("ESPRO LIFESTYLE"), a corporation formed and registered in India, entered into a written agreement with PRIMARC PECAN RETAIL (PVT.) LTD. ("PRIMARC"), a corporation formed and registered in India for the benefit of BLUE ROCK and ESPRO. Under this agreement (the "Primarc Agreement"), PRIMARC purchased condoms, lubricants and electronic cigarettes from ESPRO LIFESTYLE for a minimum amount of $500,000 for the e-cigarettes, $2,000,000 for condoms and lubricants per annum for a period of six years. A copy is attached hereto and Exhibit "1" and incorporated herein by this reference."

19. On June 26, 2015, ESPRO LIFESTYLE (PVT) LTD. ("ESPRO LIFESTYLE") entered into a written agreement with ICON MARKETING (PVT.) LTD. ("ICON"), a corporation formed and registered in India. Under this agreement (the "Icon Agreement"), ICON purchased condoms from ESPRO LIFESTYLE for a minimum amount of $2,000,000 per annum for a period of six years. A copy is attached hereto and Exhibit "2" and incorporated herein by this reference.

20. On September 28, 2015, ESPRO LIFESTYLE entered into a written agreement with PERFECT BRAND (PVT) LTD. ("PERFECT BRAND"), a corporation formed and registered in India. Under this agreement (the "Perfect Brand Agreement"), PERFECT BRAND purchased condoms for a minimum amount of $2,000,000 per annum for a period of six years. A copy is attached hereto and Exhibit "3" and incorporated herein by this reference.

21. ESPRO LIFESTYLE agreed to purchase the same minimum quantities

of the same products from ESPRO for a period of six years.

22. ESPRO accepted the benefit of the above agreements, and placed orders with UMD and UCS for delivery of condoms and electronic cigarettes to PRIMARC, ICON, and PERFECT BRAND, and has performed all the obligations under these agreements except for those obligations which they were excused or justified for not performing.

23. Pursuant to the Distribution Agreement, Cross-Defendants were required to accept the orders placed, and to deliver the goods therein referred to, alternatively, by virtue of accepting the orders placed, they were required to deliver the goods therein referred to.

24. Under paragraph 1(b) of the Distribution Agreement entered into between UMD and UCS on the one hand and BLUE ROCK and ESPRO on the other hand, UMD and UCS granted to BLUE ROCK and ESPRO, under the guidance and ongoing approval of UMD, UCS, ESEBAG and ALLEN, the non-exclusive right to manufacture condoms in India, either themselves or through a third party manufacturer.

25. It was an implied term of the Distribution Agreement that should BLUE ROCK and ESPRO elect to appoint a third party manufacturer approved by Cross-Defendants, Cross-Defendants would provide the third party manufacturer with the necessary holograms, artwork and ancillary information to enable condoms to be manufactured as contemplated in the Distribution Agreement. BLUE ROCK and ESPRO then located a third party manufacturer in India, CUPID (PVT.) LTD. ("CUPID"), with whom they contracted for the manufacture of condoms for distribution by BLUE ROCK and ESPRO throughout the territories agreed to in the Distribution Agreement.

26. Cross-Defendants breached the Distribution Agreement by failing and refusing to provide Cross-Claimants or CUPID with the necessary holograms for the condoms, and by failing to approve the artwork for the packaging of the

Playboy condoms bearing the universally known "Playboy" and "Rabbit Head Design" mark in a timely manner.

27. Cross-Defendants breached the Distribution Agreement as well as the agreements that were concluded by their acceptance of the orders placed by BLUE ROCK and ESPRO, which Cross-Defendants failed to deliver.

28. As a result of Cross-Defendants' aforesaid breaches, BLUE ROCK and ESPRO were unable to supply goods pursuant to the Primarc Agreement, the Icon Agreement and the Perfect Brand Agreement.

29. Despite Cross-Claimants' repeated demands that Cross-Defendants deliver the necessary holograms and approval of the artwork in a timely manner, Cross-Defendants failed to effect timely delivery of these items.

30. As a result of Cross-Defendants' failure and refusal to effect timely delivery of the holograms and artwork as alleged above, the orders placed with CUPID could not be fulfilled which ultimately prevented Cross-Complainants from supplying ESPRO LIFESTYLES in India, which in turn were prevented from supplying their distributors, PRIMARC, ICON and PERFECT BRAND, in India.

31. As a further consequence of the aforesaid breach, Cross-Claimants have sustained damages including loss of profits and damage to Cross-Claimants reputation in the industry, in an amount presently estimated to be in excess of $26,000,000.

32. BLUE ROCK and ESPRO have performed all their obligations under the Distribution Agreement.

WHEREFORE, Cross-Claimants pray for judgment against Cross-Defendants and each of them, as follows:

1. For compensatory damages in an amount of no less than $26,000,000;

2. For consequential damages and special damages according to proof;

3. For an award of attorneys' fees;

4. For costs of suit incurred herein; and

5. For such other and further relief as the Court may deem proper.

GORDON & GORDON
A Professional Corporation

Dated: September 28, 2016

By: ______________________________
ANTHONY B. GORDON
Attorneys f or Defendants BLUE ROCK and ESPRO